

A Critical Evaluation of the Committee of Preliminary Inquiry of the Health Professions Council of South Africa, with Specific Reference to Maxillo-facial and Oral Surgery (Part 1)

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Consider the following public statements by prof N Padayachee, president of the HPCSA:

"...The majority, on panels investigating allegations of misdemeanours by doctors, will be community representatives, and they are going to be chaired by people who are not doctors..."¹

**"...We have ... seen a steady increase (27% during the last financial year) in the amount of complaints...
...We are however cognisant of the current limitations in our processes that sometimes lead to long drawn out procedures and delays in dispensing with justice..."²**

INTRODUCTION

This study was done in order to evaluate the effectiveness of the committee of preliminary inquiry of the Health Professions Council of South Africa (HPCSA), with specific reference to maxillo-facial and oral surgery. An investigation was done at the legal department of the HPCSA regarding complaints that were lodged against Maxillo-Facial and Oral surgeons for various claims of alleged unprofessional conduct. Furthermore, a study was conducted to determine the legal framework in which this committee are supposed to function.

The purpose of this study is to offer ethically and legally justifiable recommendations to the current investigative system of the committee of preliminary inquiry (PRELIM).

PROBLEM STATEMENT

The HPCSA is responsible for the control of education, training, registration, practices and conduct of the medical and dental professions. In the instance of an unsolved medico-legal dispute arising between a patient and a practitioner, there is the possibility that the practitioner could either be reported to the HPCSA, or a civil case brought against him/her. On occasion a criminal charge is laid against a practitioner.

The first ten years of democracy in the new South Africa have emphasized the pluralism in values, principles and competing moralities that has dawned on us, bringing about several new grounds for moral and ethical controversies. Understandably the concept of medical and dental ethics have now created immense confusion in this milieu of our plural society about what is right and wrong. As medico-legal actions are steadily increasing globally, it can be expected that South Africa will probably soon follow the international trends. Although this type of litigation, in principle, has no direct bearing on the inquiries of the PRELIM *per se*, it certainly serves as an indication that patients' expectations of the medical and dental profession are increasing. It has already been noted in the subsequent increase in the number of complaints being reported to the HPCSA for investigation.

The PRELIM is expected to conduct investigations into allegations of alleged professional misconduct in order to determine whether *prima facie* evidence exists to justify a disciplinary investigation into the conduct of a practitioner. The extent of the cases brought before the PRELIM

is overwhelming. The rulings made in the vast majority of cases, such as fraud and false declarations/certificates, do not justify any further comment, as they were clearly based on sound judgement by the committee. However, one gets the impression that, especially in the more complex cases when the Dental PRELIM seemed to be in doubt, the responsibility was shifted to the relevant Professional Conduct Committee (PCC) of the Medical and Dental Professions Board (MDPB) for a decision. Practitioners have always had the right to request a High Court to review the rulings by the HPCSA, but they may now well challenge these proceedings and/or rulings more fiercely in a higher tribunal, as aggrieved practitioners have been granted a right to appeal against such decisions.³ It is obvious that this has the potential to lead to very lengthy and costly "battles" in court.

THE INFLUENCE OF GLOBAL TRENDS IN MALPRACTICE LITIGATION ON PATIENTS' EXPECTATIONS IN SOUTH AFRICA⁴

During the past few decades enormous progress has been made in Maxillo-Facial and Oral Surgery. Continuous research has resulted in a wealth of new instruments and diagnostic and therapeutic techniques and it appears that knowledge is expanding faster than man's ability to use it. From a dento-alveolar based specialty it has developed into a complex regional specialty encompassing the whole of the oro-facial area.⁵ Advanced reconstructive techniques, including free and micro-vascular flaps and dental implants, has led to a revolution in that patients with hitherto untreatable defects (such as mid-facial agenesis) or functional losses (due to

tumour resections) can now be brought back into their normal social life.^{6,7}

New technology, however, also raises the bar on patient expectations and the hopes of surgeons, while simultaneously (and temporarily) raising risk. In an unremitting cycle, the more risk is mitigated, the more clinical practice advances, only to reveal a new set of risks. Therefore, although this increase in knowledge and advances in technology are of obvious benefit to the patient, it also places additional responsibilities on the profession as a result of the concomitant increase in risks related to the new developments. The latter has created a spate of legal issues on which claims of medical negligence and misconduct can be based.^{8,9}

The question may be asked – why the increase in litigation? It is believed that rising expectations and a growing tendency to litigate in the hope that the defendant may resort to an expedient settlement, may be significant factors. However, medical negligence actions are extremely complex and¹⁰ experts are in agreement that this worldwide increase in malpractice suits cannot be ascribed to a single factor. The following divergent causes are mentioned:⁸⁻¹²

- In an era of consumerism the practitioner's traditional role as philosopher and adviser has been replaced by a cold contractual relationship between parties. Current ways of thought are increasingly rejecting medical and dental paternalism, as it is widely regarded as a disregard of the patient's moral and legal right to determining his/her health status.^{13,14}
- The introduction of legal aid for needy patients can also be raised as one of the reasons for the increase in lawsuits against practitioners.
- A further possible reason is the enormous publicity given to any legal steps taken against the medical and dental fraternities and the quantum of damages awarded by the courts in successful claims against practitioners.
- The gradual transformation of the so-called doctrine of informed consent resulted in the criteria for legally valid consent by a patient, becoming more strict.

- The plaintiff, or at least his attorney, knows that the real "defendant" in most cases is not so much the doctor in dispute, but rather an insurance company or protection society with "a fistful of dollars".

An interesting phenomenon in the USA is that the biggest increase in malpractice litigation is experienced in those areas where most progress has been made in developing new controversial methods of treatment in comparison to conventional techniques.^{15,16} Unfortunately, in areas of controversy there is usually also a strong polarisation of professional opinion.¹⁷ Extreme views often result in aggressive and nasty litigation, with matters often being compounded by inexperienced practitioners offering advice and treatment in these complex cases.

LEGAL PARAMETERS FOR THE HPCSA, AND SUBSEQUENT PRELIM

The South African Constitution¹⁸ has a direct influence on all legislation in the sense that any legislation in conflict therewith it can be struck down by the courts. The supremacy of the Constitution in the interpretation of all statutes is stated emphatically in section 2: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." It is applicable to all law and binding on all natural and juristic persons and legislative bodies, such as the HPCSA. The new National Health Act¹⁹ has recently been signed into law. Several amendments have been made to the principal Act²⁰, and subsequent Health Professions Act of 1997.²¹ The 12 chapters, with its 94 sections, deal with numerous provisions of law. It is clear that the Act rests heavily on the Constitution, with some 50 sections of the Constitution relating directly to what is contained in this Act.

The HPCSA is the *custos morum* of the medical and dental professions and is accordingly empowered by law to conduct disciplinary inquiries into allegations of improper/disgraceful conduct against practitioners.¹ It is important to take note of the functioning of the HPCSA (including the PRELIM) as an administrative body within the legal regu-

lations and parameters set by the South African law, in the context of the principles pertained in our Constitution.

a. Handling of complaints

There are clear and definite prescriptions with regard to the conduct of preliminary inquiries into claims and/or allegations of unprofessional conduct.²² The major function of the PRELIM is investigative. It has to decide whether or not a *prima facie* case exists against a practitioner, in order to determine whether a disciplinary trial should be held or not.^{23,24} If the PRELIM decides, after due consideration of the matter, that there are no grounds for an inquiry, it shall direct the registrar to communicate in writing its decision to the complainant and the accused, stating the reason(s) for such decision. However, if the PRELIM decides that an inquiry must be held into the conduct of the accused, it shall direct the registrar to arrange for the holding of an inquiry by the PCC.^{3,25}

b. Administrative bodies and natural justice

The rules of any law are applied or interpreted by institutions of the state. The legislative authority therefore makes laws, and the judicial authority applies these laws according to basic legal principles. Apart from the courts, there are administrative (quasi-judicial) tribunals, like the HPCSA, with administrative and disciplinary functions. Accordingly, the HPCSA exists by virtue of an Act of Parliament, functioning as a juristic person in terms of a statute as well as common law, which can grant or dismiss applications and impose disciplinary penalties, all of which can have a direct influence on the rights and interests of individuals.²⁶

It would appear that in general terms statutory authorities exercising a quasi-judicial function, such as the HPCSA, are bound by the ordinary rules of evidence.²⁷⁻³¹ Courts have to take into account their previous judgements in similar cases as they are bound to the approach followed in the past. The reason for this lies in the system of judicial precedent – the so-called doctrine of *stare decisis* (to stand by previous decisions). It is true that virtually no two cases are identical, as each and every case has its own unique features.³² In

comparison the same principle is found in our criminal courts.³³

c. Test for medical negligence

The norm of the reasonable person is no absolute measuring instrument but serves as a standard in relation to which a court can make a finding and through which a court can place itself in the same position as the defendant with due allowance for all the circumstances of the particular case.³⁴⁻³⁸ Fundamentally the test for negligence is an objective one insofar as the hypothetical person sets the standard, but it also contains a subjective element inasmuch as it requires that the reasonable person be placed in the same situation as the defendant found himself or herself at the time of the incident in question.³⁹⁻⁴²

A classic formulation of the test for medical negligence is found in the case of *Mitchell v Dixon*:⁴³

"A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care; and he is liable for the consequences if he does not." In the landmark case of *Castell v de Greeff*^{44,45} it was again stated that the 'reasonable doctor's' test is one that is well established in our law and is applied to both medical diagnosis and treatment, affording the necessary flexibility, and, if properly applied, does not leave the determination of a legal duty to the judgement of doctors. Although the *Mitchell*-case was decided in 1914, the Cape High Court recently held in *Oldwage v Louwrens*⁴⁶ that 'medicine is still not – and probably will never be – an exact science comparable to mathematics'. Accordingly the court reaffirmed the principles laid down in the *Mitchell*-case and reiterated the governing test for professional medical negligence being the standard of conduct of the reasonable practitioner in the particular field, thus accepting that the term 'reasonable person' embodies an objective criterion.

d. The consent-issue

Consent, and a patient's right to self-determination, is the root of many important problems in medical and dental ethics.⁴⁷ The requirement to obtain consent is imposed by law, not by the practices of the profession. Claims are increasing, and informed consent is be-

coming a major issue for practitioners defending themselves in court. The fact that the treatment might be safe and effective and given with the best interest of the patient in mind, is irrelevant to the question of whether in fact the patient consented.⁴⁸

The nature and scope of information that must be disclosed has initially caused immense confusion amongst the legal and medical/dental professions. In South Africa the traditional approach in determining the duty of a practitioner to disclose to a patient the expected risks and complications relating to the particular proposed course of treatment, changed dramatically after the landmark case of *Castell v de Greeff*. The real importance and value of the judgement in this case relates to the duty of a medical (and dental) practitioner to warn his/her patient about the risks involved in a proposed treatment. It has provided clear guidelines regarding the patient's right to knowledge of the material risk or danger of the treatment in question. Accordingly, the requirements of effective consent in the medical context must include the following:^{8,9,49-51}

- it must be recognized by law
- it must be given by someone who is legally capable of consenting;
- it must be informed consent;
- it must be comprehensive;
- it must be clear and unequivocal;
- it must be free and voluntary.

The judge in this case concluded that it does not follow that a doctor is obliged to point out meticulously each and every complication that may arise: "To do so could well result in the risk of complications and their possible further sequelae assuming an undue and even distorted significance in the patient's assessment of whether to proceed with the operation or not. Nor is the doctor obliged to educate his patient to the extent of bringing him up to the standard of his own medical knowledge of all the relevant factors involved. What he must do, it seems to me, is present his patient, in such circumstances, with a fair and balanced picture of the material risks involved."

The Appeal Court ultimately confirmed these guidelines regarding consent to medical treatment and stated as follows: "I therefore conclude that, in our law, for a patient's consent to constitute a justi-

fication that excludes the wrongfulness of medical treatment and its consequences, the doctor is obliged to warn a patient so consenting of a material risk inherent in the proposed treatment; a risk being material if, in the circumstances of the particular case: (a) a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or (b) the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it"

This judgment introduced a radical departure from the traditional approach to the question of consent, as the emphasis was now placed on what a reasonable patient would require rather than the information considered necessary by the practitioner.^{44,45,52,53} Furthermore, the new National Health Act deals extensively with the issue of consent. It is accepted in South African law that a medical or dental procedure performed on a person without his/her informed consent constitutes assault. Therefore the question of whether or not proper informed consent was provided is one of fact. The principle of informed consent is now based on 'substantial knowledge of all material risks' inherent to the planned procedure, which must exist on behalf of the patient.

In the recent decision by the Cape High Court in *Oldwage v Louwrens* the court again had to examine in great detail issues pertaining to the principles of informed consent in South African law. After due consideration the decision by the Cape High Court in the *Castell*-case was affirmed by the court. It ruled that the principles set out in the *Castell*-case set the standard for determining whether or not informed consent by a patient existed prior to a the performance of a medical procedure by a practitioner. The court also found that these principles were consistent with the rights presently enshrined in the Constitution of the Republic of South Africa, more particularly, those to individual autonomy and self-determination.

e. Expert evidence and witnesses

This is the era of the expert witness. An expert differs from other witnesses in that he is entitled to state his opinion in relation to some matter lying within his field of expertise. There is no threshold test of reliability. If a witness is apparently qualified and can give relevant evidence on a matter in issue in the proceedings,

the evidence becomes admissible in the proceedings. It is therefore somewhat astounding to the layman in the field of medicine to hear how eminent medical men put forward clinical opinions that differ quite materially — and they do so utterly convinced of the correctness of their views. It is thus not surprising that the quality of expert evidence has been the subject of many a comment in the legal press, with much being said about the battle of the experts.⁵⁴⁻⁵⁹

The assessment of expert evidence is crucial to a finding of fault on behalf of a medical or dental practitioner. The true test for expert medical opinion in medical negligence actions rests upon the fact that all factual information has been presented to him/her in order to present an objective and clinical reflection of the standard or norms of accepted medical practice in the particular circumstances. The primary function of the medical expert is to guide the court to a correct decision on questions falling within the expert's specialised field. The value a court should attach to expert medical evidence with regard to the proof of medical negligence is contentious, especially in those cases where the court will find it difficult to draw its own reliable inferences due to the technical nature of the testimony. This is particularly the case where medical experts have conflicting opinions or represent different but acceptable schools of thought in medical practice.^{8,9,44,60-63}

The Supreme Court of Appeal in the case of *Michael & Another v Linksfield Park Clinic (Pty) Ltd*⁶⁴ had the opportunity to authoritatively enunciate the general applicable considerations in assessing expert medical evidence. In principle, the court has set the boundaries for expert evidence in support or defence of medical negligence.⁶⁵ In essence, the court also affirmed the generally applicable principles already enunciated in leading South African medical case law, that the proof of medical negligence has to be determined with reference to expert evidence of members of the medical profession, but that such determination in the final instance is for the court which is not bound to adopt such testimony.^{40,44,45,61,63} The court correctly stated the rule that such determination will involve the examination of the ex-

pert opinions and the analysis of their essential reasoning preparatory to the court reaching its own conclusion on the issues raised.

The court's concern that it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support, could be overcome by strictly applying the ordinary rules of evidence. If both conflicting views on either side are capable of logical support (or rather are indicative of accepted or reasonable medical practice) the question arises whether the plaintiff has proven his or her case against the defendant medical practitioner on a preponderance of probabilities. The judgment then depends on the credibility and reliability of the expert witnesses. If the scales are evenly tipped on a review of the whole of the evidence, then absolution from the instance should be ordered. It is submitted that difficulties in assessing expert medical testimony should not erode the application of the ordinary rules of evidence.⁶⁵

The quality of expert evidence, as well as the acceptance thereof by the court, remains a controversial issue. Whatever the case, expert evidence remains an important element in the judicial process that, when properly assembled and fairly given, can greatly assist in the court's decision-making process. Albeit the fact that judges are often confronted by conflicting expert opinions on various technical and scientific issues upon cases they must adjudicate, they are generally schooled by long experience, and, with an imbued sense of equity, and inherent integrity and objectivity, will hopefully arrive at as fair a verdict as is humanly possible.

CONCLUSION

In general terms what is improper or disgraceful conduct is not a subject to simple description *per se*. It is conduct that, in the opinion of the HPCSA as *custos morum* of the profession, is improper or disgraceful. It also implies that each complaint to the HPCSA will have to be considered on its own individual merits. In this regard the Cape High Court recently held in the Oldwage-case that

medicine is still – and probably will never be – an exact science.

Consent with regard to medical and dental treatment, including maxillofacial and oral surgery, has become a major issue globally. Clear and definite legal guidelines in this regard have been provided in the landmark case of *Castell v de Greeff*. These principles have been affirmed in the very recent Oldwage-case.

The quality of expert evidence, as well as the acceptance thereof by the court, remains a controversial issue. However, it still remains a very important factor in order to provide substantiation, and subsequent proof, of charges of alleged professional negligence and misconduct. Accordingly, the South African law has set clear guidelines and boundaries for the acceptance of expert testimony in the recent case of *Michael & Another v Linksfield Park Clinic (Pty) Ltd*.

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